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3 **UNITED STATES DISTRICT COURT**  
4 **DISTRICT OF ALASKA**  
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7 **Tracey Crockett, et al.,**

8 **Plaintiffs,**

9 **vs.**

10 **NEA-Alaska, et al.,**

11 **Defendants.**  
12

**3:18-CV-00179 JWS**

**ORDER AND OPINION**

**[Re: Motions at docket 49, 53]**

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14 **I. MOTIONS PRESENTED**

15 At docket 49, Defendants NEA-Alaska, National Education Association, and  
16 Matanuska-Susitna Education Association ("Union Defendants") move to dismiss all of  
17 Plaintiffs' claims against them. They argue that Plaintiffs' claim for prospective relief  
18 with respect to compulsory payments to unions must be dismissed pursuant to  
19 Rule 12(b)(1) for lack of subject matter jurisdiction. They argue that Plaintiffs' § 1983  
20 claim and Alaska tort claims for retrospective monetary relief in relation to these  
21 compulsory payments must be dismissed under Rule 12(b)(6) for failure to state a  
22 claim. They argue that Plaintiff Kathryn McCollum's claim challenging Alaska's system  
23 of exclusive representative collective bargaining and asking for prospective relief and  
24 treble damages must also be dismissed under Rule 12(b)(6).

25 At docket 53, Defendant Matanuska-Susitna Borough School District ("School  
26 District") joins the Union Defendants' motion to the extent it addresses the more limited  
27 claims against it. Plaintiffs only seek prospective relief against the School District with  
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1 respect to its collection of compulsory union payments and with respect to its exclusive  
2 collective bargaining activities.

3 Plaintiffs<sup>1</sup> respond at docket 56. Plaintiffs concede that the court lacks  
4 jurisdiction over their claims for prospective relief with respect to compulsory union  
5 payments, but they maintain that they are entitled to retrospective monetary relief for  
6 the past collection of these payments. Plaintiff McCollum concedes that Supreme  
7 Court precedent bars her constitutional challenge to exclusive representative collective  
8 bargaining but maintains her challenge to such a system based on federal antitrust  
9 laws.

10 The Union Defendants reply at docket 58. The School District replies at  
11 docket 59. Oral argument was heard February 15, 2019.

## 12 **II. BACKGROUND**

13 Alaska's Public Employment Relations Act ("PERA") authorizes bargaining units  
14 of public employees to choose to be exclusively represented by a labor union for  
15 purposes of bargaining with public employers as to employment terms.<sup>2</sup> To cover the  
16 costs of union representation, PERA authorized public employers and unions to agree  
17 that all represented employees would pay their proportionate share of the costs of  
18 representation, regardless of union membership.<sup>3</sup> That is, a union could require  
19 through its collective bargaining agreement that public employers collect "fair share  
20 fees" from non-union members that would be remitted to the union to apply towards its  
21 bargaining activities. In the event an employee qualified as a religious objector to union  
22 activities under PERA, a bargaining agreement could nonetheless require that the

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24 <sup>1</sup>Plaintiffs in this case at this time include Timothy Christopherson, Kathryn McCollum,  
25 David Ness, Carol Carman, Dolores McKee, and Donn Liston. The lead Plaintiff in the case  
26 caption, Tracey Crockett, has been terminated from the case. If the parties wish to remove  
Plaintiff Crockett from the court's official caption, a motion to amend the caption must be filed  
with the court.

27 <sup>2</sup>AS 23.40.100(b).

28 <sup>3</sup>AS 23.40.110(b).

1 employee pay a fair-share fee to the union, but the union had to donate the amount of  
2 that fee to a charity of its choosing.<sup>4</sup> Until recently, such fair-share fees were explicitly  
3 authorized by Supreme Court precedent, *Abood v. Detroit Board of Education*.<sup>5</sup> *Abood*  
4 held that public employees may be required to pay their proportionate share of the  
5 costs of union representation for collective bargaining purposes.<sup>6</sup>

6 Matanuska-Susitna Education Association ("MSEA") is the union that represents  
7 a bargaining unit of the School District's employees. Plaintiffs McCollum and McKee  
8 are employees in that bargaining unit. The agreement between the School District and  
9 the employees includes a fair-share provision that required the School District to deduct  
10 fees from its payments to non-union members and remit them to MSEA. Plaintiff  
11 McCollum was not a union member at the time Plaintiffs filed their complaint; therefore,  
12 she was required to pay fair-share fees. Plaintiff McKee was a union member at the  
13 time. She alleges that she has long opposed the union but chose to remain in it  
14 because she otherwise would have had to pay a fair-share fee "and the difference in  
15 money between the full membership dues and the [fair-share fees] would not have  
16 been worth the loss of [her] vote and . . . influence . . . in collective-bargaining matters."<sup>7</sup>

17 The other plaintiffs are current or former public school teachers that worked in  
18 other school districts and were represented by NEA-Alaska affiliate unions for collective  
19 bargaining purposes. Plaintiffs Ness and Christopherson were compelled to pay  
20 non-union member fair-share fees to their representative union. Plaintiff Carmen was  
21 not a union member but was compelled, as a religious objector under AS 23.40.225, to  
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23 <sup>4</sup>AS 23.40.225.

24 <sup>5</sup>431 U.S. 209 (1977).

25 <sup>6</sup>Under *Abood*, payments may be compelled from non-union members for collective  
26 bargaining activities but not for "ideological activities unrelated to collective bargaining." *Id.* at  
27 236.

28 <sup>7</sup>Doc. 44 at ¶ 38.

1 pay fees to the union for charitable purposes. Plaintiff Liston is a retired teacher who  
2 had been a union member during his career but, like Plaintiff McKee, alleges that he  
3 only became one because he otherwise would have been required to pay fair-share  
4 fees.

5 On June 27, 2018, the Supreme Court issued its decision in *Janus v. AFSCME*,<sup>8</sup>  
6 which overruled *Abood* and held that requiring non-union members to pay union fees as  
7 a condition of public employment "violates the First Amendment and cannot continue."<sup>9</sup>

8 On August 2, 2018, Plaintiffs filed suit under 42 U.S.C. § 1983, Alaska common  
9 law, and federal antitrust law. Their complaint can be divided into four different  
10 requests: (1) a request for declaratory and injunctive relief to prevent the future  
11 collection of fair-share fees, including religious objector fees; (2) a request that the  
12 Union Defendants be required to refund all fair-share fees collected prior to *Janus*; (3) a  
13 request that the Union Defendants be required to refund a portion of union membership  
14 dues paid by Plaintiffs McKee and Liston; and (4) a request for prospective relief that  
15 would make Alaska's exclusive representative collective bargaining system unlawful  
16 and prevent its future use, as well as a request for treble damages to public employees  
17 who have not been allowed to negotiate on their own behalf.

### 18 **III. STANDARD OF REVIEW**

19 Rule 12(b)(6) tests the legal sufficiency of a plaintiff's claims. In reviewing such  
20 a motion, "[a]ll allegations of material fact in the complaint are taken as true and  
21 construed in the light most favorable to the nonmoving party."<sup>10</sup> To be assumed true,  
22 the allegations, "may not simply recite the elements of a cause of action, but must  
23 contain sufficient allegations of underlying facts to give fair notice and to enable the  
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26 <sup>8</sup>138 S. Ct. 2448 (2018).

27 <sup>9</sup>*Id.* at 2486.

28 <sup>10</sup>*Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997).

opposing party to defend itself effectively."<sup>11</sup> Dismissal for failure to state a claim can be based on either "the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory."<sup>12</sup> "Conclusory allegations of law . . . are insufficient to defeat a motion to dismiss."<sup>13</sup>

To avoid dismissal, a plaintiff must plead facts sufficient to "state a claim to relief that is plausible on its face."<sup>14</sup> "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."<sup>15</sup> "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."<sup>16</sup> "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'"<sup>17</sup> "In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief."<sup>18</sup> "In all

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<sup>11</sup>*Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

<sup>12</sup>*Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

<sup>13</sup>*Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).

<sup>14</sup>*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

<sup>15</sup>*Id.* (citing *Twombly*, 550 U.S. at 556).

<sup>16</sup>*Id.* (citing *Twombly*, 550 U.S. at 556).

<sup>17</sup>*Id.* (quoting *Twombly*, 550 U.S. at 557).

<sup>18</sup>*Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009); *see also Starr*, 652 F.3d at 1216.

cases, evaluating a complaint's plausibility is a 'context-specific' endeavor that requires courts to 'draw on ... judicial experience and common sense.'"<sup>19</sup>

In deciding whether to dismiss a claim under Federal Rule of Civil Procedure 12(b)(6), the Court is generally limited to reviewing only the complaint, but may review materials which are properly submitted as part of the complaint and may take judicial notice of undisputed matters of public record that are outside the pleadings.<sup>20</sup> Furthermore, documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss.<sup>21</sup>

#### **IV. DISCUSSION**

##### **A. Prospective relief with respect to compulsory union fees**

Plaintiffs concede in their response brief that they cannot seek injunctive relief against the Union Defendants and the School District to prevent the future collection of compulsory union fees because there is not a current controversy to be resolved on this point.<sup>22</sup> The day *Janus* was announced, NEA-Alaska sent a letter to all non-union members in bargaining units represented by its local affiliates to inform them that it would cease collecting fair-share fees. It informed them that any such fees that had been collected in advance—to cover the period falling after the *Janus* decision date up to the end of the fiscal year—would be refunded. Refund checks were mailed the next day. NEA-Alaska local affiliates contacted school districts to notify them to immediately

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<sup>19</sup>*Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014) (quoting *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014)).

<sup>20</sup>See *Gonzalez v. First Franklin Loan Services*, 2010 WL 144862, at \*3 (E.D. Cal. Jan. 11, 2010) (citing *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001); *Campanelli v. Bockrath*, 100 F.3d 1476, 1479 (9th Cir. 1996); *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986)).

<sup>21</sup>*Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

<sup>22</sup>Doc. 56 at p. 41.

1 stop deducting fair-share fees. Given that it is undisputed that the collection of  
2 fair-share fees ceased immediately after *Janus*, there is no actual, live controversy  
3 sufficient to establish this court's jurisdiction over Plaintiffs' claims for prospective relief  
4 with respect to fair-share fees.<sup>23</sup>

5 **B. Monetary relief with respect to compulsory fees collected pre-*Janus***

6 Plaintiffs ask for monetary damages under § 1983 for the Union Defendants'  
7 collection of fair-share fees pre-*Janus*. They assert that the court's *Janus* decision is  
8 retroactive under *Harper v. Virginia Department of Transportation*.<sup>24</sup> Consequently,  
9 Plaintiffs assert that the Union Defendants' past collection of fair-share fees from them,  
10 as non-members, was a constitutional deprivation for which they are entitled to § 1983  
11 damages. The Union Defendants contend that *Janus* was not meant to have a  
12 retroactive effect, but they note that the court need not make an affirmative ruling on  
13 the issue because regardless of how the civil retroactivity doctrine applies to the case,  
14 the good faith defense excuses them from liability under § 1983. They argue that they  
15 are shielded from monetary liability because they collected fair-share fees according to  
16 a presumptively valid state statute and as authorized under then-binding Supreme  
17 Court precedent, *Abood*.

18 As private defendants acting under the color of state law, the doctrine of qualified  
19 immunity from § 1983 suits is not available to the Union Defendants. The Supreme  
20 Court in *Wyatt v. Cole*<sup>25</sup> held as much based on the fact that the rationales justifying the

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22 <sup>23</sup>See *Timbisha Shoshone Tribe v. Dep't of Interior*, 824 F.3d 807, 812 (9th Cir. 2016)  
23 (discussing how the court's jurisdiction is premised on there being an actual controversy to  
24 resolve). Recent district court cases in this circuit have also dismissed claims for prospective  
25 relief with regard to compulsory union fees post-*Janus* for lack of current controversy. See  
26 *Danielson v. Inslee*, 345 F. Supp. 3d 1336, 1338-40 (W.D. Wash. 2018); *Danielson v. AFSCME*  
*Council 28*, 340 F. Supp. 3d 1083, 1084 (W.D. Wash. 2018); *Cook v. Brown*, No. 6:18-cv-  
01085, 2019 WL 982384, at \*3-\*4 (D. Or. Feb. 28, 2019); *Carey v. Inslee*, 3:18-cv-05208, 2019  
WL 1115259, at \*3-\*4 (W.D. Wash. Mar. 11, 2019).

27 <sup>24</sup>509 U.S. 86 (1993).

28 <sup>25</sup>504 U.S. 158 (1992).

1 application of qualified immunity to government officials are not transferrable to private  
2 parties.<sup>26</sup> However, in so holding, the Court did not foreclose "the possibility that private  
3 defendants faced with § 1983 liability . . . could be entitled to an affirmative defense  
4 based on good faith."<sup>27</sup> The Court recognized that "principles of equity and fairness  
5 may suggest . . . that private citizens who rely unsuspectingly on state laws they did not  
6 create and may have no reason to believe are invalid should have some protection from  
7 liability."<sup>28</sup> Since *Wyatt*, several circuit courts, including the Ninth Circuit, have relied  
8 upon the defense in shielding private defendants from liability.<sup>29</sup> In *Clement v. City of*  
9 *Glendale*, the Ninth Circuit relied on the good faith defense when it affirmed that a  
10 private defendant, a towing company, was entitled to summary judgment as to the  
11 plaintiff's § 1983 claim against it for towing her car in violation of the Fourteenth  
12 Amendment. It held that the facts of the case supported the application of the defense:  
13 the towing company "did its best to follow the law" in that "the tow was authorized by  
14 the police department, conducted under close police supervision and appeared to be  
15 permissible under both local ordinance and state law."<sup>30</sup>

16 Plaintiffs argue that *Clement* contradicts a prior Ninth Circuit case, *Howerton v.*  
17 *Gabica*.<sup>31</sup> They assert that *Howerton* makes "good-faith defenses . . . categorically  
18 inapplicable to private parties who violate section 1983."<sup>32</sup> *Howerton*, which came

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20 <sup>26</sup>*Id.* at 168.

21 <sup>27</sup>*Id.* at 169.

22 <sup>28</sup>*Id.* at 168.

23 <sup>29</sup>*Clement v. City of Glendale*, 518 F.3d 1090 (9th Cir. 2008); *Wyatt v. Cole*, 994 F.2d  
24 1113 (5th Cir. 1993); *Vector Research, Inc. v. Howard & Howard Attorneys, P.C.*, 76 F.3d 692,  
25 698-99 (6th Cir. 1996); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1275-78  
(3d Cir. 1994).

26 <sup>30</sup>518 F.3d at 1097.

27 <sup>31</sup>708 F.2d 380 (9th Cir. 1983).

28 <sup>32</sup>Doc. 56 at p. 16.



1 before *Clement*, held only that a private party cannot invoke the doctrine of qualified  
2 immunity from suit—a holding that the Supreme Court would later endorse in *Wyatt*. As  
3 noted above, the Court in *Wyatt* left open the possibility that private defendants could  
4 avail themselves of an affirmative defense based on good faith, a concept which the  
5 Court recognized as separate and distinct from qualified immunity.

6 Plaintiffs also argue that only private individuals, as opposed to private  
7 companies, can invoke good faith to protect themselves from § 1983 liability. They  
8 base such an argument on the fact that qualified immunity only applies to individual  
9 officials, not government entities. Again, however, qualified immunity is not the same  
10 as a good-faith affirmative defense. The rationale for qualified immunity—protecting  
11 individual officers from the threat of personal monetary liability for carrying out their  
12 duties—is admittedly not transferrable to private entities. However, other rationales,  
13 such as principles of equity and fairness, support the application of the defense to  
14 private entities in certain circumstances.<sup>33</sup> Moreover, *Clement*, the controlling case law  
15 in this circuit allowed a private entity to assert the good-faith defense.

16 Plaintiffs alternatively argue that if the defense is indeed available to private  
17 defendants in § 1983 cases, its application is nonetheless limited. They argue that  
18 under *Wyatt* the defense can only be applied to a constitutional claim if the claim is  
19 analogous to a common law tort that would have conferred similar defenses when  
20 § 1983 was enacted. They argue that the most analogous tort in this situation is  
21 conversion, and because conversion does not include an intent element, the good faith  
22 defense cannot apply. Like the other three district courts in the Ninth Circuit to consider  
23 this argument, the court disagrees with Plaintiffs' construction of the defense.<sup>34</sup>

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26 <sup>33</sup>See *Wyatt*, 504 U.S. at 168-69; *Cook*, 2019 WL 982384, at \* 6.

27 <sup>34</sup>See *Danielson*, 340 F. Supp. 3d at 1086; *Cook*, 2019 WL 982384, at \*5-\*6; *Carey*,  
28 2019 WL 1115259, at \* 6.

1        *Clement* did not interpret the defense in this limited manner. It applied the  
2 defense to a § 1983 claim without considering whether the common law would have  
3 conferred the defense with respect to an analogous tort. The court was clearly more  
4 "concerned about the inequities of holding the private towing company liable" when it  
5 subjectively and reasonably believed it was following the law.<sup>35</sup> Indeed, the impetus for  
6 such a defense is rooted in concerns about the unfairness that would result from  
7 holding private parties retrospectively liable under § 1983 for following the law. When  
8 the Supreme Court held that private parties using a process established by state statute  
9 can be considered state actors for purposes of § 1983, it recognized that private  
10 individuals could unfairly be held liable if the state law is later held to be unconstitutional  
11 and suggested that the "problem should be dealt with . . . by establishing an affirmative  
12 defense."<sup>36</sup> As noted by the Union Defendants, the approach propounded by Plaintiffs  
13 "would increase the potential for unfairness by permitting some defendants that rely on  
14 presumptively valid state laws to assert the defense while others could not, based  
15 solely on the elements of various nineteenth-century common law torts."<sup>37</sup>

16        Even if the court must find a common law analogue, conversion is not the most  
17 closely related tort. "The core element of Plaintiffs' First Amendment claim . . . is not  
18 that the Unions acquired property. Instead, [it] is premised upon their right not to be  
19 compelled by the government to associate with the Unions' expressive activities."<sup>38</sup>  
20 That is, their claim stems from the dignitary harm that comes from being compelled to  
21 support speech with which they disagree, not the taking of their property.

22        There are other common law torts with scienter elements that can be analogized  
23 to Plaintiffs' claim. Tortious interference with a contract is one such cause of action:

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25        <sup>35</sup>2019 WL 982384, at \*6.

26        <sup>36</sup>*Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 942 n.23 (1982).

27        <sup>37</sup>Doc. 58 at pp. 8-9.

28        <sup>38</sup>Doc. 58 at p. 11.

1 The wages from which Plaintiffs' agency fees were deducted were a  
2 contractual debt owed to Plaintiffs by their employer under the collective  
3 bargaining agreement. In 1871, such a debt could not provide the basis for  
4 a conversion claim. Instead, a plaintiff would have had to pursue a claim  
based on the third party's interference with the employer's satisfaction of its  
contractual obligations--- and malice or lack of justification was an element of  
[that tort] at common law.<sup>39</sup>

5 Abuse of process is also analogous to Plaintiffs' First Amendment claim. It is a "cause  
6 of action against private defendants for unjustified harm arising out of the misuse of  
7 governmental processes."<sup>40</sup> Here, Plaintiffs' claim against the Union Defendants  
8 depends on the use of governmental processes: their "invocation of Alaska statutes  
9 authorizing deduction of agency fees from employees' paychecks and transmission of  
10 those fees to the [Union Defendants]."<sup>41</sup> At common law, an abuse of process claim  
11 requires the plaintiff to establish that the defendant acted with malice or without  
12 probable cause. Given the array of common law torts with scienter elements that can  
13 be analogized to Plaintiffs' claim, the good-faith defense would be available to the  
14 Union Defendants under Plaintiffs' approach.

15 Plaintiffs also assert that the defense is further limited in that it should only  
16 protect defendants from legal claims, as opposed to equitable ones. Plaintiffs argue  
17 that because they seek repayment from the Union Defendants based on equitable  
18 considerations, the defense cannot apply here. Plaintiffs' position is unavailing under  
19 the case law. Furthermore, as the Union Defendants persuasively argue in their reply  
20 brief:

21 Plaintiffs had no expectation of receiving the fair share fees paid to the  
22 Unions, and Plaintiffs already have received the benefits of collective  
23 bargaining representation paid for with those fees. Requiring the Unions to  
pay those funds to Plaintiffs as an equitable remedy would 'stand[ ] that  
remedy on its head.'"<sup>42</sup>

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25 <sup>39</sup>Doc. 58 at p. 11. See also *Danielson*, 340 F. Supp. 3d. at 1086.

26 <sup>40</sup>*Wyatt*, 504 U.S. at 164.

27 <sup>41</sup>Doc. 58 at p. 12.

28 <sup>42</sup>Doc. 58 at p. 18 (citing *Gilpin v. AFSCME*, 875 F.2d 1310, 1316 (7th Cir. 1989)).

1 Plaintiffs' argument is also flawed in that the relief they seek does in fact sound in law.  
2 Their fair-share fees paid for ongoing costs of representation the Union Defendants  
3 provided on their behalf. There is no segregated fund to which Plaintiffs' payments can  
4 now be traced, and therefore any relief would be paid from the Union Defendants'  
5 general assets. A "personal claim against the defendant's general assets . . . is a *legal*  
6 remedy, not an equitable one."<sup>43</sup>

7         Given that the good faith defense is indeed available to private defendants in  
8 § 1983 cases, the court must consider whether it in fact shields the Union Defendants  
9 from monetary liability here. In line with the three other district courts that have applied  
10 the defense under nearly identical facts, the court concludes that it does. As discussed  
11 above, "traditional principles of equity and fairness . . . underpin the [good faith]  
12 defense."<sup>44</sup> The Union Defendants collected fair-share fees in accordance with PERA  
13 and in accordance with then-binding Supreme Court precedent that upheld the  
14 constitutionality of such fees. "It would be highly inequitable to hold private parties  
15 retroactively liable for § 1983 damages in such a circumstance."<sup>45</sup>

16         Plaintiffs argue that the good faith defense should not apply to the facts here  
17 because the Union Defendants should have known that the Supreme Court was poised  
18 to overturn *Abood* given dicta in the Court's cases over the past six years. They argue  
19 it was beyond question that the Court had "grave misgivings about the constitutionality  
20 of public-sector agency shops" and the Union Defendants should not have continued to  
21 collect fees pursuant to these arrangements in the face of such uncertainty, which  
22 therefore precludes any argument that they collected fees in good faith.<sup>46</sup> But "reading  
23 the tea leaves of Supreme Court dicta has never been a precondition to good faith  
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25         <sup>43</sup>*Montanile v. Board of Trustees*, 136 S.Ct. 651, 658 (2016).

26         <sup>44</sup>*Cook*, 2019 WL 982384, at \*7.

27         <sup>45</sup>*Id.*

28         <sup>46</sup>Doc. 56 at p. 25.

1 reliance on governing law."<sup>47</sup> Barring the use of the good-faith defense on a private  
2 defendant who relied on Supreme Court precedent to justify its conduct based on the  
3 likelihood of the Supreme Court overruling that precedent would indeed "imperil the rule  
4 of law."<sup>48</sup>

5 Plaintiffs argue that, if nothing else, it is improper to dismiss a claim based on the  
6 good-faith defense pursuant to Rule 12(b)(6). They assert that the defense is a  
7 subjective one that requires evidence of the defendant's actual state of mind.

8 Therefore, they believe they need an opportunity to gather evidence as to what the  
9 Union Defendants subjectively believed about the continued lawfulness of such fees;  
10 that is, whether they understood such fees to be "constitutionally dubious."<sup>49</sup> Such  
11 evidence, they assert, would prove whether the Union Defendants were indeed acting  
12 in good faith or whether they were just collecting as much money as they could before  
13 the inevitable overruling of *Abood*. Again, this argument has been considered and  
14 correctly rejected as unworkable by the other courts addressing this same issue in  
15 these circumstances:

16 Admittedly, the subjective state of mind of a party asserting good faith is a  
17 common inquiry in cases discussing the defense. . . . But applying the  
18 subjectivity standard to this case results in a perverse outcome, if followed  
19 to its logical conclusion. Assuming that the Union Defendant (or, more  
20 accurately, an employee of the union), subjectively believed the Supreme  
21 Court would *not* overrule *Abood*, the Union Defendant's collection of  
22 [fair-share] fees, up until *Janus*, would be shielded by the good faith defense,  
23 but not so if the same employee instead subjectively believed (correctly) that  
24 the Supreme Court *would* overrule *Abood*. . . . Inviting discovery on the  
25 subjective anticipation of an unpredictable shift in the law undermines the  
26 importance of observing existing precedent and ignores the possibility that

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27 <sup>47</sup>*Cook*, 2019 WL 982384, at \*7.

28 <sup>48</sup>*Id.*; see also *Carey*, 2019 WL 1115259, at \*7 (noting that such a position on the good  
faith defense would cause "chaos in constitutional interpretation").

<sup>49</sup>Doc. 56 at p. 25.

1 prevailing jurisprudential winds may shift. . . . The good faith defense should  
2 apply here as a matter of law.<sup>50</sup>

3 It is indisputable that the Union Defendants' collection of fair-share fees was lawful  
4 under state statute and then-binding Supreme Court precedent. No amount of  
5 discovery would prove otherwise.

6 Relatedly, Plaintiffs argue that dismissal is premature because the Union  
7 Defendants have not shown that its pre-*Janus* collection of fees from non-union  
8 members complied with *Abood's* restriction on the use of these fees for non-ideological  
9 activities only. They assert that discovery is needed on this compliance issue before  
10 the Union Defendants can establish a good-faith defense. Their argument is without  
11 merit. As noted by the Union Defendants "Plaintiffs do not allege the Unions failed to  
12 comply with *Abood*. Instead, Plaintiffs seek a refund of all fees the Unions received in  
13 reliance on *Abood*."<sup>51</sup> Their argument that discovery is needed on a different claim for  
14 different relief on a different class before the court can apply the good-faith defense  
15 simply does not track.

16 **C. Monetary relief for union dues collected pre-*Janus***

17 Plaintiffs McKee and Liston were union members who paid union membership  
18 dues rather than fair-share fees. They allege that they only became members because  
19 they otherwise would have been forced to pay fair-share fees and the difference  
20 between the amount of the membership dues and the amount of the fair-share fees  
21 "would not have been worth the loss of their vote and whatever little influence they  
22 might have been able to exert in collective bargaining matters."<sup>52</sup> That is, they believe  
23 the existence of the "unconstitutional agency shop" structure and its accompanying

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25 <sup>50</sup>*Danielson*, 340 F. Supp. 3d at 1086; see also *Carey*, 2019 WL 1115259, at \*7 (stating  
26 that "good faith may be decided as a matter of law when the defendant relied upon a valid  
statute").

27 <sup>51</sup>Doc. 58 at p. 17.

28 <sup>52</sup>Doc. 44 at ¶ 38.

1 fair-share fees compelled their union membership. They seek a refund of a portion of  
2 their union membership fees exceeding the amount of the fair-share fees paid by  
3 non-union members. Given that the union members' claim is also based upon  
4 pre-*Janus* collection of fair-share fees, the court concludes that the good-faith defense  
5 applies here as well.

6 Other reasons support denial of the union members' claims. First, they admit  
7 that they made a decision to pay union membership dues in exchange for certain  
8 benefits: a right to vote in union elections and the ability to influence collective  
9 bargaining efforts. This voluntary choice precludes an argument that they were  
10 compelled to subsidize the Union Defendants' private speech. Indeed, "*Janus* says  
11 nothing about people who join a union, agree to pay dues, and then later change their  
12 mind about paying union dues."<sup>53</sup> Their assertion that their union memberships were  
13 compelled because they should have had the option to avoid union fees altogether, as  
14 *Janus* now makes clear, is unpersuasive. The fact that plaintiffs would not have opted  
15 to pay union membership fees if *Janus* had been the law at the time of their decision  
16 does not mean their decision was therefore coerced.

17 Second, Plaintiffs McKee and Liston's agreement to become union members in  
18 exchange for benefits created a contract between them and their unions that remains  
19 enforceable after *Janus*.<sup>54</sup> Plaintiffs cannot "seek to claw back money paid in exchange  
20 for already-provided contractual benefits . . . based on later changes in the law."<sup>55</sup>  
21 Plaintiffs argue that the Union Defendants cannot rely on this contractual argument to  
22 support dismissal under Rule 12(b)(6) because the contract is not described or  
23 referenced in the complaint. However, the complaint admits that Plaintiffs McKee and  
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26 <sup>53</sup>*Belgau v. Inslee*, No. 18-5620, 2018 WL 4931602, at \*5 (W.D. Wash. Oct. 11, 2018).

27 <sup>54</sup>*Fisk v. Inslee*, No. C16-5889, 2017 WL 4619223, at \*5 (W.D. Wash. Oct. 16, 2017).

28 <sup>55</sup>Doc. 50 at p. 33; *Coltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 277 (3d Cir. 2002).

1 Liston agreed to pay union membership dues in exchange for membership benefits.  
2 This admission alone supports the Union Defendants' contractual argument.

3 **D. Monetary relief under Alaska common law**

4 Plaintiffs argue that they are entitled to a refund of pre-*Janus* fair-share fees and  
5 dues under state tort law, specifically conversion and trespass to chattels, as well as  
6 "replevin, unjust enrichment, restitution, and any other legal or equitable cause of action  
7 that offers relief for the unlawful seizure of their personal property."<sup>56</sup> The Union  
8 Defendants are entitled to have these state law claims dismissed under Rule 12(b)(6),  
9 because there can be no common law liability for conduct authorized by state statute.  
10 Plaintiffs do not dispute that PERA authorized fair-share fees, and the Alaska Labor  
11 Relations Agency, pursuant to PERA, promulgated regulations setting forth the  
12 procedures for collecting fees. This "comprehensive system to govern labor relations  
13 for public employees that includes fair-share fees . . . displaced any contrary common  
14 law in this area."<sup>57</sup> Pursuant to *Janus*, the federal Constitution prohibits the continued  
15 enforcement of fair-share fee requirements under PERA; however, *Janus* "did not  
16 change the Alaska Legislature's determination that fair-share fees do not violate state  
17 law."<sup>58</sup> That is, *Janus* does not change the fact that PERA displaced any state common  
18 law tort claims that could have been brought with regard to fair-share fees collected  
19 prior to *Janus*.

20 Plaintiffs argue that because the statute is now unconstitutional it can no longer  
21 "confer immunity on otherwise tortious conduct."<sup>59</sup> The court disagrees. It cannot  
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23 <sup>56</sup>Doc. 44 at ¶ 58.

24 <sup>57</sup>Doc. 50 at p. 36. See AS 01.10.010 ("So much of the common law not inconsistent  
25 with . . . any law passed by the legislature of the State of Alaska is the rule of decision in this  
26 state."); *City of Homer v. Gangl*, 650 P.2d 396 (Alaska 1982) (noting that the adoption of an  
applicable statute "prevails over the principles of common law").

27 <sup>58</sup>Doc. 50 at p. 37.

28 <sup>59</sup>Doc. 56 at p. 32.



1 ignore the fact that the Union Defendants' collection of fair-share fees prior to *Janus*  
2 was authorized by state statute that was constitutional under controlling precedent. The  
3 court cannot now go back and impose tort liability under common law for that conduct.  
4 In any event, the court agrees with the Union Defendants that dismissal of Plaintiffs' tort  
5 law claims is also warranted because Plaintiffs cannot establish the elements of the  
6 various common law claims.<sup>60</sup>

7 **E. Exclusive representative collective bargaining**

8 Plaintiff McCollum uses the Supreme Court's issuance of *Janus* as an  
9 opportunity to challenge not only the Union Defendants' past collection of fair-share  
10 fees but also to more broadly challenge Alaska's system of exclusive representative  
11 collective bargaining. She contends that the *Janus* decision calls into doubt the  
12 constitutionality of exclusive union bargaining.<sup>61</sup> She alleges that Alaska's exclusive  
13 collective bargaining system infringes upon her associational freedoms because she  
14 "remains bound to the terms of employment negotiated by a union that she does not  
15 belong to and wants nothing to do with."<sup>62</sup>

16 Despite the dicta set forth in *Janus* that enticed Plaintiff McCollum to bring such  
17 a First Amendment challenge, binding Supreme Court precedent flatly rejects her  
18 position. In *Minnesota State Board for Community Colleges v. Knight*,<sup>63</sup> the Supreme  
19 Court held that a system of exclusive union representation does not violate the speech  
20 or associational rights of individuals who are not members of the union. Indeed, the  
21 Court in *Janus* reaffirmed as much, distinguishing between compelled financial support  
22 for a union's exclusive representation and the underlying system of exclusive union  
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24 <sup>60</sup>See doc. 50 at pp. 37-40; Doc. 58 at pp. 21-22 for reasoning that the court adopts  
25 herein.

26 <sup>61</sup>Doc. 44 at ¶ 50.

27 <sup>62</sup>Doc. 44 at ¶ 49.

28 <sup>63</sup>465 U.S. 271 (1984).

1 representation and acknowledging that states can continue to require that a union serve  
2 as the exclusive bargaining agent for its public employees.<sup>64</sup> Plaintiff McCollum now  
3 concedes that she cannot maintain her constitutional challenge to Alaska's system of  
4 exclusive union bargaining. She, however, maintains that the system is nonetheless  
5 unlawful under federal antitrust law.

6 Plaintiff's antitrust theory is that collective bargaining agreements stemming from  
7 Alaska's PERA are anti-competitive because they require compensation based on  
8 union-imposed pay scales and prevent individual employees from negotiating  
9 compensation based on individual performance and merits. Plaintiff fails to cite any  
10 case authority for her position. Indeed, it does not stand to reason that "federal  
11 antitrust law prohibits Alaska from structuring labor relations for its public-sector  
12 employees in the same way that Congress structured labor relations for private-sector  
13 and federal government employees and that approximately 40 other states have  
14 structured their public employee labor relations."<sup>65</sup> Federal antitrust law, which seeks to  
15 preserve competition in the private sector, simply does not encompass the way in which  
16 a state chooses to set employment terms for its public employees. As to employees  
17 not covered by federal labor relations law, Congress left states "free to legislate as they  
18 see fit, and [to] apply their own views of proper public policy to the collective bargaining  
19 process."<sup>66</sup>

20 Several exemptions and doctrines of federal antitrust law bolster this court's  
21 conclusion that Plaintiff's claim falls outside the ambit of federal antitrust law. First,  
22 antitrust laws do not "restrain a state or its officer or agents from activities directed by  
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25 <sup>64</sup>138 S. Ct. at 2465-67, 2485 n. 27.

26 <sup>65</sup>Doc. 58 at p. 23.

27 <sup>66</sup>*United Farm Workers of Am. v. Ariz. Agric. Emp't Relations Bd.*, 669 F.2d 1249, 1257  
28 (9th Cir. 1982).

1 its legislature."<sup>67</sup> Plaintiff consequently cannot challenge PERA itself. The legislature's  
2 adoption of this exclusive representative bargaining system is "an undoubted exercise  
3 of state sovereign authority" and is immune without further analysis.<sup>68</sup>

4 The collective bargaining agreements between the Union Defendants and school  
5 districts, which are a result of this legislatively authorized system, likewise cannot be  
6 challenged under antitrust laws. Although non-state actors, the Union Defendants and  
7 school districts are undoubtedly carrying out the state's regulatory scheme through their  
8 collective bargaining, and the agreements that stem therefrom, and consequently enjoy  
9 state-action immunity from federal antitrust laws as to this conduct.<sup>69</sup> There are no  
10 issues of fact to develop on this issue; that is, it is indisputable that the challenged  
11 restraint—a collective bargaining agreement negotiated by a representative union—is  
12 "clearly articulated and affirmatively expressed as state policy."<sup>70</sup>

13 Plaintiff argues that state immunity cannot be applied to dismiss her antitrust  
14 claim under Rule 12(b)(6) because the Union Defendants, as private actors, cannot  
15 avail themselves of the state-action immunity defense unless, in addition to carrying out  
16 state policy, they are actively supervised by the state in carrying out that policy, which is  
17 an issue not discernible on the face of the complaint. The active supervision  
18 requirement, however, is inapplicable here because the other party to the challenged  
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20 <sup>67</sup>*Parker v. Brown*, 317 U.S. 341, 350-51 (1943); see also *Town of Hallie v. City of Eau*  
21 *Claire*, 471 U.S. 34, 39 (1985) (noting that public entities such as municipalities are exempt  
22 from federal antitrust laws if their anticompetitive activities are authorized by state policy meant  
23 to displace competition with regulation).

24 <sup>68</sup>*N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct 1101, 1110-11 (2015) (stressing  
25 that state legislation is an exercise of a state's sovereign power and therefore exempt from the  
26 operation of antitrust laws).

27 <sup>69</sup>See *Chamber of Commerce v. City of Seattle*, 890 F.3d 769, 781 (9th Cir. 2018)  
28 (discussing when the Supreme Court has extended state-action immunity to non-state actors).

<sup>70</sup>*Id.* at 782. See also *Preferred Commc'ns, Inc. v. City of L.A.*, 754 F.2d 1396, 1414  
(9th Cir. 1985) (stating that state-action immunity extends to actions that the legislature  
contemplated when authorizing the conduct at issue or that were a "necessary or reasonable  
consequent of engaging in the authorized activity").

collective bargaining agreement is the School District. "[U]nlike private parties, [local government] entities are not subject to the 'active state supervision requirement' because they have less of an incentive to pursue their own self-interest under the guise of implementing state policies."<sup>71</sup> A local government entity is entitled to a presumption that it "acts in the public interest" and consequently there is "little or no danger" that the entity would become "involved in a *private* price-fixing arrangement."<sup>72</sup>

Second, the labor of a human being cannot be a commodity whose price is protected under federal antitrust regulation.<sup>73</sup> Therefore, "restraints on the sale of the employee's services to the employer"—those employment terms set forth in a collective bargaining agreement—"are not themselves combinations or conspiracies in the restraint of trade or commerce under the Sherman Act" even if they "curtail the competition among employees."<sup>74</sup> Indeed, the Ninth Circuit has held that restraints in a collective bargaining agreement fall within the labor exemption to federal antitrust law.<sup>75</sup>

Third, the court is persuaded that the *Noerr-Pennington* doctrine also shields collective bargaining agreements from a federal antitrust challenge. Under the doctrine, efforts to convince the government to act in an anticompetitive manner are protected by the First Amendment. Federal antitrust law therefore does not "regulate the conduct of private individuals in seeking anticompetitive action from the government."<sup>76</sup> As long as the unions are not using the governmental process, as opposed to the outcome of the

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<sup>71</sup>*FTC v. Phoebe Putney Health Sys. Inc.*, 568 U.S. 216 (2013) (citing *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46-47 (1985)).

<sup>72</sup>*Hallie*, 471 U.S. at 45, 47.

<sup>73</sup>15 U.S.C. § 17.

<sup>74</sup>*Apex Hosiery Co. v. Leader*, 310 US 469, 503 (1940).

<sup>75</sup>*Bodine Produce, Inc. v. United Farm Workers Org. Comm.*, 494 F.2d 541, 558 (9th Cir. 1974).

<sup>76</sup>*City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 379-80 (1991).

1 process, as an anticompetitive weapon, negotiating with public officials for employment  
2 terms that may in fact restrict competition is exempt from federal antitrust liability.<sup>77</sup>

3 **V. CONCLUSION**

4 Based on the preceding discussion, the motions at docket 49 and 53 are  
5 GRANTED. Plaintiffs' complaint is hereby dismissed in its entirety.

6 DATED this 14<sup>th</sup> day of March 2019.

7  
8 /s/ JOHN W. SEDWICK  
9 SENIOR JUDGE, UNITED STATES DISTRICT COURT  
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27 <sup>77</sup>*Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988); *see also*  
28 *Omni Outdoor Adver.*, 499 U.S. at 380.